Supreme Court, U.S.
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No. 98-1564

IN THE
SUPREME COURT OF THE UNITED STATES

DOROTHY MACKEY,

Petitioner,

v.

DAVID W. MILAM, TRAVIS ELMORE, AND UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

DOROTHY MACKEY has petitioned this Court for a writ of certiorari to review the judgment and opinion of a divided panel of the Sixth Circuit, on interlocutory appeal under 28 U.S.C. § 1292(b). App. A. The decision below reversed an order of the district court which declined, in part, to reconsider its rejection of a Westfall Act certification that respondents Milam and Elmore acted within the "scope of [their] office or employment," 28 U.S.C. § 2679(d)(2), that is, "in line of duty," id. § 2671, when they subjected petitioner Mackey to severe forms of sexual harassment. App. B, C.

The respondents do not deny the importance of the two questions presented but urge that the petition should be denied because the issues presented in this Court were not raised below. On the merits, the government asserts -- with no support in statutory language or legislative purpose or history -- only that federal courts "should" look to state law in deciding whether removal under the Westfall Act is proper. None of these objections justifies denial of the petition.

1. The Court should not apply the general rule that certiorari is appropriate only with respect to questions raised below, since both of the questions are jurisdictional and were passed upon below.

The brief in opposition ("BO") relies first upon the objection that the two questions presented in this petition were not raised below. BO 7. The cases it cites, however, by their terms, invoke a "traditional rule," United States v. Williams, 504 U.S. 36, 41 (1992), that

applies only "ordinarily." Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 8 (1993). As this Court discussed in Williams -- where it was the United States that successfully presented a question it had not raised below -- this Court looks equally to the question whether the issue was "passed upon" below. 504 U.S. at 41. Here, both questions were "passed upon" by the Sixth Circuit.

The first issue, whether there was appellate jurisdiction under 28 U.S.C. § 1292(b), was necessarily "passed upon" when the court of appeals determined that it had and would exercise jurisdiction (App. A5; 154 F.3d at 650), a question it could not in any event have assumed or pretermitted. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 140 L.Ed.2d 210, 226-32 (1998). The court of appeals is always obligated to examine its own jurisdiction as well as that of the district court. Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986). Indeed, as extensively discussed in Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995), the scope-of-employment issue, insofar as it controls the removal decision, is part of a jurisdictional determination in the district court. It was thus required to be passed upon in the court of appeals, as the district court had to answer the state law versus federal law issue in order to determine under the Westfall Act whether to accept jurisdiction over the removed civil action.

In any event, the second question presented by this petition was "passed upon" expressly, when the court below ruled that "Under the Westfall Act, '[w]hether an employee was acting within the scope of his employment is a question of law ... made in accordance with the law of the state where the conduct occurred.'" App. A6; 154 F.3d at 650, quoting RMI Titanium Co. v. Westinghouse

Electric Corp., 78 F.3d 1125, 1143 (6th Cir. 1996) (citation omitted). At respondents' request, the same issue was also passed upon by the district court, which relied on the same authority and ruled that Ohio law applied. App. C3-C4.

As to the second question, at least, the court of appeals would not have given any further consideration to the issue had it been raised by counsel, given the binding circuit precedent on point. As suggested in Williams, this Court does no service for the adversary process in the courts of appeals if it requires diligent counsel to argue what to the court below seem to be settled points. 504 U.S. at 42 n.2.

This Court's policy against considering points not pressed below "is not inflexible." Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 697 (1984). See Youakim v. Miller, 425 U.S. 231, 234-35 (1976) (per curiam). The two questions presented by petitioner, although they are difficult and important legally, refer to uncomplicated and undisputed factual aspects of the record. Cf. Capital Cities, 467 U.S. at 698. Finally, the objection that the issues presented in a petition for certiorari were not pressed below is at its weakest with respect to jurisdictional matters. Nixon v. Fitzgerald, 457 U.S. 731, 741-43 (1982). The issues presented by this petition are "purely legal." Id. at 743 n.23. Indeed, as was true in the court of appeals, if certiorari were granted on the Westfall Act issue, this Court would have to examine the § 1292(b) question whether or not it was expressly separately presented. Steel Co., 523 U.S. 83, 140 L.Ed.2d at 227.

The failure of petitioner's trial counsel to raise below the questions presented here should not dissuade this Court from consideration of the instant petition.

2. The defect in the certification process below was not merely "procedural," it was jurisdictional.

Petitioner's argument under § 1292(b) is simple and clear: because the district court did not comply with the express requirements of that statute and Fed.R. App.P. 5(a), the court of appeals lacked jurisdiction to accept an interlocutory appeal in this matter. Pet. i, 11-19. Respondents assiduously avoid using the term "jurisdiction" to describe the defect, referring to "lack[of] authority," BO i, or even "procedural grounds." BO 7. Refusing to call a problem by its name cannot make that problem disappear.

The respondents appear to make the tautological argument that there is no jurisdictional defect because the certification order must be deemed to have amended the prior order, and it should be deemed to have had this effect because otherwise it would be invalid. See BO 8. Simply because the later order refers to the earlier order, however, does not mean that the latter is thereby "modifie[d]," id., much less "amended," as required.[1]

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[1] Petitioner need not argue here, and has not argued, "that a district court's certification under Section 1292(b) must be physically part of the order resolving the issue as to which an appeal is sought," BO 7, because that question is not presented. If the district court had issued an order stating that its prior order was "hereby amended" (or words to that effect) to include a § 1292(b) certification, that might have sufficed, regardless of reiteration or attachment. But the certification makes no mention of amending the May 27, 1997, order. See App. D. It simply certifies an issue presented by that order, as the government had asked it to do.

As discussed in the petition, Rule 5(a) does not provide for interlocutory appellate jurisdiction upon certification of an issue simpliciter, it allows an interlocutory appeal upon issuance or amendment of an order that contains a certification of an issue. This allows a petition to appeal that order, as so amended, to be filed within ten days. If Congress and the Judicial Conference intended to allow appeals simply upon the filing of a certification, the rule would not have made reference to amendments of the underlying order at all. Compare Fed.R.App.P. 4(a)(5), 4(a)(6), 4(b)(4).[2] It could simply have provided for the issuance of certifications of controlling issues, from which interlocutory appeals might then be taken. That is not the system which exists, however. As this Court recently emphasized in Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 204-05 (1996), a § 1292(b) appeal lies "from the order" presenting the question.

In Yamaha, this Court treated that language in the statute as carefully defining the court of appeals' jurisdiction; likewise here, because the interlocutory appeal lies "from the order" presenting the potentially controlling question, Fed.R.App.P. 5(a), a petition to the court of appeals does not properly invoke that court's jurisdiction if it is filed within ten days after entry of an order containing a certification, but that order is separate

[2] These rules allow the district court, under specified circumstances, to extend the time to appeal or (in civil cases) to reopen the time to appeal. In contrast to the wording of Rule 5(a), the Rule 4 provisions do not require amendment or alteration of the antecedent appealable order. The respondents' argument would render meaningless the distinctions between the procedures authorized by these two rules.

from the underlying order involving the controlling question and does not purport to amend the antecedent, substantive order. Jurisdiction under § 1292(b) is not favored or to be loosely encouraged. Caterpillar Inc. v. Lewis, 519 U.S. 61, 74 (1996). The respondents' plea to be excused from strict compliance with the rules when seeking the right to take an interlocutory appeal should be rejected.

Accordingly, to the extent that the respondents' claim that this Court should deny certiorari because petitioner's jurisdictional "argument is without merit," BO 8, it is the respondents' position that falls short. The petition for certiorari should be granted.

3. Respondents offer no reasoned support for the view, followed below, that a state's "scope of employment" doctrine should control the question whether a federal court must take jurisdiction under the Westfall Act of a sexual harassment case against individual military personnel.

Applying a dubious interpretation of Ohio law, a divided panel of the Sixth Circuit reversed the Ohio district judge and held that the respondents' sexual harassment of petitioner occurred in "the scope of [their] employment" as her military supervisors, 28 U.S.C. § 2679(d)(2), which is to say, "in line of duty." Id. § 2671.[3] The court thus reached a result contrary to the

[3] The respondents seem to have the relationship between "scope of employment" and "line of duty" under the statute backwards. Congress provided that "in the case of a member of the military" the term "within the scope of ... employment" means "acting in line of duty." Id. § 2671. This obviously says

rule that would apply under federal employment law. See Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998). It is also contrary to the law which either a federal or state court would be bound to apply in a Federal Employers' Liability Act case. See Baker v. Texas & Pacific Ry., 359 U.S. 227 (1959) (per curiam) (uniform body of federal master-servant law controls scope-of-employment issue in FELA case tried under state courts' concurrent jurisdiction). It is also contrary to military policy. See Pet. 24-25 (willful misconduct excluded from "line of duty"), 27-28 (sexual harassment strictly prohibited in military environment).[4] The intent of Congress to create such an odd scheme would have to be quite clear to justify reaching that result.

On the merits, the respondents rely on the uniform opinions of many circuits,[5] all of which simply presume their interpretation of the Westfall Act is controlled by this Court's summary construction of language in 28 U.S.C. § 1346(b) ("in accordance with the

(cont'd)

not that "line of duty" means "scope of employment," BO 11 n.5, but rather that "within the scope of employment" for military members means "in line of duty" -- which necessary then requires the court to determine what "in line of duty" means as a term of art in military law. That is what the petition discusses and shows -- demonstrating that it always excludes "willful misconduct" such as sexual harassment.

[4] The Brief in Opposition contains not a word suggesting that anything petitioner has set forth on either score is in the slightest inaccurate.

[5] This case law cannot, however, be viewed as deeply-entrenched, as the Westfall Act is barely ten years old.

law of the place where the act or omission occurred") which does not appear in § 2679(d)(2). See Williams v. United States, 350 U.S. 857 (1955) (per curiam). The respondents assert that extension of the Tort Claims Act's adoption of state law to this different context "follows logically," BO 10, because the standards that govern federal court jurisdiction on removal "should" be the same as those which ultimately determine the government's liability to the plaintiff. BO 11.

The "logic" of this is not explained, nor why it "should be" so. BO 12. A federal jurisdictional statute is not necessarily to be construed as identical in scope to the procedural statutes to which it relates, see Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 615-16 (1979) (28 U.S.C. § 1343 and 42 U.S.C. § 1983), nor is a removal statute necessarily as broad. Georgia v. Rachel, 384 U.S. 780, 789-92 (1966) (28 U.S.C. § 1443). To the contrary, what is logical is that federal employees should be protected from personal civil liability for acts committed within the scope of their employment to the same extent wherever in this country they may be assigned, and that federal not state policy should determine when their willful misconduct will cost them the loss of such protection. Such a system is in no way inconsistent with the judgment of Congress, expressed in the Federal Tort Claims Act, 28 U.S.C. § 1346(b), that a person injured by a federal employee should be able to sue the federal government only under the same circumstances that the plaintiff could sue any other employer in that state for its employee's torts.

CONCLUSION

For the foregoing reasons, and for the reasons discussed more fully in the Petition, DOROTHY MACKEY prays that this Court grant her petition for a writ of certiorari, vacate the judgment below, and remand to the United States District Court for further proceedings.

Respectfully submitted,

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